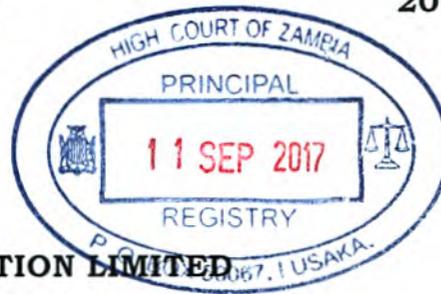


**IN THE HIGH COURT OF ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**  
*(Civil Jurisdiction)*

2015/HP/0178



BETWEEN:

**GANGA DRILLING AND EXPLORATION LIMITED****PLAINTIFF**

AND

**PROSPER INVESTMENTS LIMITED****DEFENDANT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 11<sup>th</sup> DAY OF  
SEPTEMBER, 2017**

*For the Plaintiff : Mr G.S Cornhill, Messrs Wilson and Cornhill*

*For the Defendant : No appearance*

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## **J U D G M E N T**

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The Plaintiff suing by way of writ of summons on 10<sup>th</sup> February, 2015 commenced this action claiming;

- i. *Payment of K158, 833.40 being monies owed by the Defendant to the Plaintiff in respect of drilling operations of 12 boreholes at the Defendant's site in Makeni conducted by the Plaintiff, at the Defendant's own request and instance.*
- ii. *Interest and costs*
- iii. *Any other relief that the court may deem fit.*

According to the statement of claim, the Defendant had requested the Plaintiff to drill boreholes at its site Makeni, and the Plaintiff drilled 12 boreholes on the following conditions:

- |  |             |
|--|-------------|
| 1. Cost of drilling up to 50 metres and supply and installation of casings up to 30 metres | K10, 500.00 |
| 2. Cost of drilling beyond 50 metres, per metre  | K200.00     |
| 3. Cost of supply and installation of casings beyond 30 metres, per metre                  | K250.00     |
| 4. Cost of a dry borehole up to 50 metres  | K5, 000.00  |

That the total amount due to the Plaintiff is K185, 833.40, as per the account statement below:

	Cost K	Extra Depth(m)	Extra Casing (m)	Total K
Borehole No 1		55	0	
Dry (21/09)	5000	8250	0	<b>13250</b>
Borehole No 2		30	0	
Dry (22/09)	5000	4500	0	<b>9500</b>
Borehole No 3		30	0	
Dry (22/09)	5000	4500	0	<b>9500</b>
Borehole No 4		40	0	
Dry (23/09)	5000	6000	0	<b>11000</b>
Borehole No 5		60	0	
8" (26/09)	32000	12000	0	<b>44000</b>
Borehole No 6		50	0	
6" (27/09)	10500	10000	0	<b>20500</b>
Borehole No 7		45	0	
6" (28/09)	10500	9000	0	<b>19500</b>

Borehole No 8	37	0	0	
Dry (01/1)	500000	0	0	<b>5000</b>
Borehole No 9		35	0	
Pilot (02/10)	5000	70000	0	<b>12000</b>
Borehole No 10	27	0	0	
Dry (02/10)	5000	0	0	<b>5000</b>
Borehole No 11		30	0	
6" (03/10)	10500	6000	0	<b>16500</b>
Borehole No 12		30	0	
Dry (03/10)	5000	4500	0	<b>9500</b>
As on 03/10/2012			Total Balance (ZMK)	<b>175250</b>
		Diesel		
		1989 litres	@ 7566	15048774
			Sub Total	<b>160201226</b>
			VAT @ 16%	25632196
			Grand Total ZMK	<b><u>K185833433</u></b>

It is stated that the Defendant issued two cheques as payment, being cheque number 001675 dated 30<sup>th</sup> August, 2014 in the amount of K100, 000.00, and cheque number 001676, dated 30<sup>th</sup> September, 2014 for the sum of K85, 833.00, bringing the total to K185, 833.40. However after the Plaintiff deposited the cheques, the Defendant unlawfully instructed the bank not to

pay the amounts, and the amount owing still remains unpaid. The Plaintiff claims the said amount with interest thereon.

The Defendant in the defence filed on 27<sup>th</sup> February, 2015 denied the claims stating that it only contracted the Plaintiff to drill a total of five boreholes that had been sited by them by the Water Affairs Department, and did not agree to the terms and conditions alleged by the Plaintiff, and the sum claimed. The defence is that the cheques were only given to the Plaintiff as guarantee pending agreement between the parties as to what was due to the Plaintiff, and the amounts were not filled on the cheques, or indeed agreed. Further that the Defendant did not agree that the cheques be tendered and as such it instructed the bank not to pay them.

The Defendant denies having neglected to pay the sums claimed, or that the Plaintiff has suffered any loss, and states that the Plaintiff is not entitled to any of the reliefs sought.

At the trial the Plaintiff called one witness, while the Defendant did not appear. PW1 was Shasi Kaneh Reddy, a director of the Plaintiff Company. He testified that he had given the Defendant a quotation for the boreholes, after someone from there asked for it. He identified the document at page 2 of the Plaintiff's bundle of documents as the said quotation. He explained the lay-out of the quotation, stating that the first seven parts indicate the things that the Plaintiff would do, while the items on 8 and 9 were not requested by the Defendant.

Further in his testimony, PW1 stated that number 4 on the quotation indicates that they would drill from 0 to 50 metres at a cost of K10, 500.00, but that this was not guaranteed. It was stated that after 50 metres they would charge K200.00 per metre, and that after a distance of 30 metres from the 50 metres, they would charge K250.00 per metre.

He also testified that the bottom of the document indicates that K5000.00 would be charged for a dry borehole up to 50 metres. That the Defendant had asked for a discount on the K200.00 charged per metre, after the 50 metres

was drilled, and was charged K150.00 per metre. He stated that an invoice was raised, and they dug an extra 55 metres making 105 metres. His evidence with regard to the second borehole was that it was also dry, and they charged K5000.00 for the dry borehole, and thereafter drilled an extra 30 metres.

He stated that the third borehole was also dry, and thirty extra metres were drilled. That even the fourth borehole was dry, and an extra 40 metres were drilled after that. PW1 testified that with regard to the fifth borehole, the client asked for an 8 inch borehole and not 6 inches, as it had good water, and after it was drilled, it was cased. The price for this borehole was stated as K32,000.00, and the extra depth of 60 metres was drilled at K200.00 per metre bringing the total amount due to K44,000.00.

As regards the sixth borehole, the testimony was that they drilled a 6 inch borehole and the yield was good, and it was cased, and the cost was K10,500.00. That because it was successful, they drilled an extra 50 metres. PW1's evidence with regard to the seventh borehole was that it also had water, and it was cased. He stated that they were asked to go an extra 45 metres at a cost of K9,000.00, bringing the total to K19,500.00. As for borehole number 8, it was stated that the Plaintiff drilled up to 37 metres, and they could not proceed as the formation was bad. That they considered it as a dry borehole, and the Defendant was charged K5000.00 for it.

PW1 stated that the ninth borehole was dug without depth, at K5,000.00, and they drilled an extra 35 metres. That borehole number 10 was drilled only up to twenty seven meters, as it had a bad formation, and K5000.00 was charged for it. He stated that the eleventh borehole was a success, and a 6 inch borehole was drilled at K10,500.00. He stated that they went an extra 30 metres at a cost of K6,000.00, bringing the total to K16,500.00.

With regard to borehole number 12, PW1 testified that this borehole was dry, and they drilled an extra 30 metres at a cost of K4,500.00, bringing the total cost to K9,500.00. PW1 also told the court that the bill was raised on 3<sup>rd</sup> October, 2012 in the amount of K175,250.00. He stated that the Defendant

had given them 1986 litres of diesel at K7.566 per litre valued at K15, 048.774, and that when this amount was deducted from the total amount, the bill came to K160, 201.226. That value added tax (VAT) at 16% in the amount of K250, 321.96 was added as the client was not VAT exempt, bringing the total bill to K185, 833.433.

Further in his testimony, PW1 testified that the Defendant had asked for time to pay, as it wished to sell maize and then make the payment. The letter at page 4 of the Plaintiff's bundle of documents was identified as the e-mail that he had sent the Defendant attaching the invoice, and the reply was on the bottom of that page. That it is indicated there that the Defendant was waiting for payment from Seba Foods.

With reference to page 5 of the Plaintiff's bundle of documents, PW1 told the court that the Defendant had left the blank cheques at the reception with instructions that PW1 endorses the amounts on the cheques, and deposits them. That the cheques are dated a month apart, and when PW1 phoned the client, he did not respond, but instead messages that PW1 should wait. It was his evidence that he endorsed the amount of K100, 000.00 on one cheque, and K85, 000.00 on the other, and thereafter he deposited them, after he had phoned the Defendant.

He also stated that the cheques were however not honoured as the Defendant wrote to the bank stopping the payment. The letter on page 9 of the Plaintiff's bundle of documents was identified as the said letter, and PW1 told the court that the bank gave him a copy of that letter. PW1 prayed that the amount claimed be paid to the Plaintiff.

I have considered the evidence. It is not in dispute that the Defendant had contracted the Plaintiff to drill some boreholes on its site in Makeni, and the Plaintiff did drill some. The dispute is on what number of boreholes was agreed to be drilled, and at what cost.

PW1 in his evidence referred the court to the document at page 2 of the Plaintiff's bundle of documents, as the quotation that was issued when they were approached for the drilling of the boreholes. This quotation is dated 23<sup>rd</sup> September, 2012, and quotes the price of a successfully drilled and cased borehole of up to 50 metres at a cost of K10, 500.00. The dry borehole is quoted at K5000.00 up to 50 metres. The document further states that drilling beyond 50 metres would be charged at K200.00 per metre, while casing beyond 30 metres would be charged at K250.00 per metre.

In the defence filed, the Defendant states that it only contracted the Plaintiff to drill five boreholes that had been sited by the Water Affairs Department, and that it did not agree to the Plaintiff drilling the boreholes on the conditions contained on the quotation on page 2 of the Plaintiff's bundle of documents. The Defendant's defence is also that it only gave the Plaintiff the cheques pending agreement by the parties on what was due to the Plaintiff.

The Plaintiff in the reply states that the parties did not agree that a specified number of boreholes should be drilled, but that the number to be drilled depended on the water yield because the Defendant required vast amounts of water to feed into the centre pivot irrigation system. The Plaintiff in the reply also states that it located the drilling sites, and did not depend on information given by the Department of Water Affairs, and that out of the twelve boreholes drilled, five had good yield, and seven were dry.

The Plaintiff also states in the reply that the terms and conditions of the agreement were specifically agreed, and signed for by both parties.

On page 1 of the Plaintiff's bundle of documents is the terms and conditions that were signed. The document is signed by representatives of both the Plaintiff and the Defendant. This document signed on 23<sup>rd</sup> September, 2012 states that the Defendant would pay K5, 000.00 for a dry borehole of up to 50 metres, among other conditions.

From this documentary evidence, it can be inferred that the Defendant agreed to the terms and conditions stated on page 1 of the Plaintiff's bundle of documents, as it signed the document. Secondly it can be said that the Plaintiff did issue the quotation on page 2 of its bundle of documents which indicates the price of a successful borehole which is cased at K10, 500.00, and that extra drilling beyond 50 metres was charged at K200.00 per metre, and casing beyond 30 metres was at K250.00 per metre.

The question that arises is whether the defence that the parties had agreed that only five boreholes would be drilled stands? There is no document on record that shows that a specific number of boreholes was agreed to be drilled. PW1 testified that they drilled a total of twelve boreholes, and that on 3<sup>rd</sup> October, 2012, they raised the bill, and gave it the Defendant who asked for time to pay. That later the Defendant stated that it was waiting for payment from Seba Foods in order to be able to pay the Plaintiff.

On page 4 of the Plaintiff's bundle of documents is an e-mail that PW1 wrote to the Defendant attaching the bill of quantities for phase 1 drilling of the farm, and asking for payment. At the bottom of that e-mail, the Defendant had responded acknowledging, and stating that they had to wait for eleven days for Seba Foods to pay, and attached the document from Seba Foods.

The document from Seba Foods is at page 3 of the Plaintiff's bundle of documents. The e-mail on page 4 of the Plaintiff's bundle of documents shows that the Defendant acknowledged the attached documents sent by the Plaintiff, but asked that the Plaintiff waits for eleven days.

There is nowhere in that document disputing what the Plaintiff had quoted, and required payment. The Defendant merely acknowledged and asked for time to pay. It can therefore be concluded that the Defendant accepted the bill raised by the Plaintiff, and further that this bill was computed on the basis that the parties had agreed that no specific number of boreholes were to be drilled, but that the number depended on how many were successful. The Plaintiff is therefore entitled to be paid for the work that it did.

I have already stated that the Defendant agreed to the terms and conditions of the drilling set out on page 1 of the Plaintiff's bundle of documents, and that the quotation for the boreholes was given as shown on page 2 of the Plaintiff's bundle of documents. Therefore the Defendant not having shown that it did not agree to the quotation, it is bound to pay for the works done. The Defendant did not dispute that the twelve boreholes were drilled as shown in paragraph 4 of the statement of claim which outlines the works done per borehole, and at what cost.

The defence merely gives a bare denial of the claim outlined in paragraph 4 of the statement of claim, and the defence that the cheques were given to PW1 as guarantee while the parties agreed on the amount due cannot stand, as the Plaintiff's evidence has not been shaken.

The Defendant has therefore not raised any doubt on what is claimed and I find that the Plaintiff has proved on a balance of probabilities that it did drill the twelve boreholes as outlined in paragraph 4 of the statement of claim, and at the cost quoted. I therefore enter judgment its favour for the amount of K185,833.433 with interest at the average short term deposit rate from date of issue of the writ until judgment, and thereafter at a rate of six percent per annum until payment. The Plaintiff is also awarded costs to be taxed in default of agreement. Leave to appeal is granted.

**DATED THE 11<sup>th</sup> DAY OF SEPTEMBER, 2017**

  
**S. KAUNDA NEWA**  
**HIGH COURT JUDGE**